

No. 11040.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY,

Appellant,

vs.

MAYNARD GARRISON, Insurance Commissioner of the
State of California, and H. F. RISBROUGH and MAE
BARR LONG, Deputy Insurance Commissioners of the
State of California,

Appellees.

PETITION FOR REHEARING.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

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Comes now the First National Benefit Society, the above named appellant and petitions the court for rehearing of the above entitled case on the following grounds, to wit:

I.

The plaintiff (appellant herein) complained of many acts of the defendants which it alleged constituted a campaign to destroy the business of the plaintiff in the State of California.

One of these contentions was such acts as threatening with arrest and arrest of agents such as F. O. Robertson,

named in the said complaint. The Court has upheld the decision in the lower court on the authority of the *Robertson* case. We wish to call the Court's attention to the fact that the Robertson incident is only one of the type of acts complained of in the said complaint. In paragraph II of the complaint [Tr. pp. 6-8], the plaintiff (appellant herein) has alleged that the defendants have advised the *members* of the said Society to forfeit their certificates therein, and that they have told members of the Society that these certificates were "illegal" and that they were "not worth the paper they were written on," and otherwise entered upon a campaign of molestation and interference of the said plaintiff. The complaint further states [Tr. p. 7] that the certificates of the plaintiff are legal, authorized by law and that the statements of the defendants are untrue and were, by the said defendants, known to be untrue.

The said complaint further definitely sets out the names of certain members of the said Society which the said defendants had molested and to whom they had represented that they could not collect on plaintiff's policies, and to whom they had stated that plaintiff's policies were illegal [Tr. pp. 7-8]. The said complaint further alleges that the said members were legally acquired by the said plaintiff.

That plaintiff's second cause of action sets forth the continual interference with the members of the said Society, advising them to drop their insurance therein and to obtain insurance in other companies. That the said second cause of action, by reference, incorporates therein paragraphs I, II, III and IV of its first cause of action. That paragraph II of said first cause of action [Tr. p.

3] sets forth that the plaintiff has many members in the State of California, some acquired by application by mail and others by reinsurance [Tr. p. 3].

The complaint alleges that plaintiff (appellant herein) had secured many members by taking their applications while they were residents of the State of Arizona where the plaintiff is authorized to do business and that subsequent thereto they had moved their residence from Arizona to the State of California and that the defendants herein had counselled them to drop their insurance with appellant [Tr. p. 10]. The complaint sets out some of the names of the defendants who actually gave such counsel to legitimate members of the plaintiff and some of the names of those who were counselled to drop their insurance [Tr. pp. 9-10].

All of these matters are alleged to have caused and would continue to cause great and irreparable injury to the plaintiff. These acts have no connection with the Commerce Clause, and there is no statute of the State of California authorizing them. They are illegal by the law of the State of California and in violation of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States. These matters constitute the entire second cause of action set forth in the complaint. They were not disposed of in the opinion of the trial court and the decision in the *Robertson* case (*F. O. Robertson v. The People of the State of California*, October Term, 1945, No. 274, decided June 3, 1946) is in no way applicable to them. The complaint sets these matters out by allegations in due form. They constitute fundamental rights of this plaintiff and we respectfully and earnestly request this court to pass its judgment upon them.

Plaintiff has alleged, in the said complaint, this type of interference not only in specific language and in referring to specific instances, but has alleged that many acts of similar nature, constituting a campaign to destroy the business of the plaintiff in California, has been indulged in by the plaintiff, and has also alleged such similar acts in general terms and that under these pleadings plaintiff would be entitled to prove the acts alleged and stands ready to prove them, and similar acts, such as advising newspapers to refuse advertising of the plaintiff; advertisements for agents with no specification that the agents were to work in California. The complaint also alleges that these acts were too numerous to be set forth in full [Tr. p. 8].

The lower court in its opinion in this case held (in line with a multitude of authorities) that if the acts of the officers complained of were acts not sanctioned by the law or done under the authority of an unconstitutional law, the suit would be one against the officers and not against the state. A few cases upholding this principle are:

Sterling v. Constantine, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375;

Elmer v. Wallace, 275 Fed. 86;

Great Atlantic & Pac. Tea Co. v. Valentine, 12 F. Supp. 760; Affirmed as *Valentine v. Great Atlantic & Pac. Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22.

This matter was disposed of in the lower court on a Motion to Dismiss, which was sustained without leave to amend. The only matter disposed of in the Court's opinion was the contention of appellant that the acts of the defendants were in violation of the Commerce Clause of

the Constitution of the United States. Appellant's second cause of action, setting out in detail the acts of the defendants constituting a ^{destruction} ~~desecration~~ of legally obtained business with people who are now residents of California, has not been mentioned. These acts are in no way connected with interstate commerce and there is no law in the State of California or elsewhere to authorize such acts. They constitute a plain invasion of the property rights of this appellant without the faintest color of authority or law and are mere unauthorized personal acts of the defendants and each of them. These are the statements of the complaint and for the purpose of this appeal must be assumed to be true.

Appellant therefore respectfully petitions this Court to make its order granting a rehearing of the case in regard to those allegations.

Respectfully submitted,

ROBERT R. WEAVER,

EARL BLODGETT,

Counsel for Appellant.

Certificate of Counsel.

I, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ROBERT R. WEAVER,

EARL BLODGETT,

Counsel for Appellant.

